The Public Contract Regulations 2006

Jake Davies assesses the importance of abiding by the Regulations, following recent case law

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'Contracting authorities need to set out clearly what they want and how they are going to evaluate any tender offers. Offers then need to be demonstrably evaluated in accordance with those evaluation criteria.'

Current readjustments in the UK property and construction industries mean that many 'economic operators' that have relied on the private sector for business opportunities are increasingly interested in working with the public sector.

When looking to secure work from public sector entities the parties need to be aware of certain different considerations. Key among these are the Public Contracts Regulations 2006 (the Regulations).

The decision of the European Court of Justice (ECJ) in *Jean Auroux v Commune de Roanne* [2007] makes it likely that those negotiating development agreements with 'contracting authorities' as defined in the Regulations (which includes local authorities) will also have to develop a greater understanding of the Regulations.

In *Roanne* the ECJ held that a development agreement between the Municipal Council of Roanne and a development company was covered by the Regulations and should have been tendered and awarded in accordance with them.

Given that the process of working up regeneration schemes can take many years and involve a considerable investment of time, money and effort, the prospect that prior to signing any development agreement the local authority must first follow an advertised process inviting third parties from across the European Union to take part may come as a surprise to developers and an inconvenience to local authorities who may be mid-way through such negotiated procurements.

While a detailed analysis of *Roanne* is not proposed in this article (not least because it is understood that guidance on the very issues it raises is imminent from the Office of Government Commerce), the case is evidence of the pervasiveness of the Regulations in public sector procurement. To understand the issues a basic knowledge of what the Regulations provide is required.

Background

Membership of the European Community requires each member state to commit to various principles as set out in the Treaty of Rome. These principles include:

- a prohibition of discrimination on the grounds of nationality;
- a prohibition of restrictions on movements of goods; and
- freedom for economic providers to provide services in another member state.

In order to prevent breaches of these basic principles and ensure that member states themselves put such principles into practice, EC directives require all member states to implement regulation of the award of public and utilities contracts above certain financial thresholds. In the UK these directives are currently enacted by the

Regulations and the Utilities Contracts Regulations 2006 (as amended by the Public Contracts and Utilities Contracts (Amendment) Regulations 2007). Similar, but not identical, rules apply in all member states of the EC.

It should be noted that compliance with the Regulations does not discharge the general obligations of state entities to comply with the general principles, although it is evidence that compliance has taken place.

Do the Regulations apply to a project?

To test whether the Regulations will apply to any particular project the following questions need to be considered:

- Is the contract with or for a contracting authority?
- Is the relevant financial threshold exceeded?
- Does the contract fall within the definition of public works?
- Is the contract excluded by the Regulations?

Dealing with each question in turn:

Defining a contracting authority

These are widely defined in regulation 3 and listed (albeit not exhaustively) in Schedule 1 to the Regulations.

Contracting authorities include ministers of the Crown, government departments, local authorities, and fire and police authorities.

They also include a corporation established, or a group of individuals appointed, to act together for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and financed wholly or mainly by another contracting authority, subject to management supervision by another contracting authority, or where more than half the board of directors or members, or, in the case of individuals, more than half of those individuals, are appointed by another contracting authority. It is a wide definition.

Current financial thresholds

To 31 December 2009 these are:

- £3,497,313.00 for public works contracts.
- £139,893.00 or £90,319.00 for public services and public supply contracts, depending on criteria set out in the Regulations.

The thresholds are set by the European Commission and will be revised on 1 January 2010.

It should be noted, however, that contracting authorities must comply with the fundamental rules and general principles embodied in the Treaty of Rome (as amended from time to time), even if these thresholds are not exceeded.

The consideration does not have to be an actual payment. Anything that confers a benefit with a commercial value can be counted, and as such could include land (leasehold or freehold) or rights to develop which would be valued at or above the thresholds. Future rents received on lands transferred at anything less than open market value are within this definition.

Definitions of public works

These are defined in the Regulations as follows:

> 'Public works contract' means a contract, in writing, for consideration (whatever the nature of the consideration):
>
> (a) for the carrying out of a work or works for a contracting authority; or
>
> (b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements.

'Works' are widely defined in Schedule 2 to the Regulations to include demolition, construction of new buildings, restoration works, civil engineering constructions, construction of roads, railways, waterways etc.

As a subset of the public works contract the 'public works concession contract' is defined as:

> A public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract.

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It is this definition that is likely to require close examination when seeking to answer the question of whether a development agreement with a local authority should be tendered in accordance with the Regulations.

In *Roanne* the ECJ undermined a general assumption that the EC procedure set out in the Regulations did not apply to development agreements that did not relate to the procurement of overtly civic works of construction.

The relevant EU Directive defines public works contracts as including those having as their 'object' the design and/or execution of works that correspond to requirements of the contracting authority (eg, in the context of development agreements it has some kind of desired regenerative benefit). This can be, and in *Roanne* was, interpreted very widely.

The ECJ in *Roanne* applied a 'purposive' approach to the EC's intention of preventing cross-border barriers to competition. The Court said (among other things) that it was necessary to look at the intended outcome of the development project as a whole, and whether the end result would fulfil a requirement specified by the authority, even though individual components

of the project may ostensibly seem to be 'private'.

The case makes it more difficult to argue that development agreements need not be tendered in accordance with the Regulations.

Local authorities are generally law-abiding in the UK, and in the light of the *Roanne* decision are likely to be reviewing relationships to ensure compliance with the law as set out in the Regulations. By their very nature contracting authorities tend to be keen to be seen to be complying with the principles set out in the Regulations (and also implied by public law obligations) to operate transparently and fairly.

Of more immediate significance, the ECJ judgment could also mean that contracting authorities negotiating with developers without having followed the Regulations are in breach of them.

It is therefore possible that those involved in negotiating development agreements with local authorities will need to comply with the process set out in the Regulations, possibly to regularise existing negotiations.

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Is there any chance that the Regulations don't apply?

Regulation 6 lists the contracts excluded from the above process. These include contracts for the acquisition of land, contracts for financial services and services concession contracts. Clearly it will be a question of fact on a case-by-case basis whether or not these exceptions apply, but, as mentioned above, it seems unlikely in connection with development agreements.

Regulation 14 (dealing with the use of the negotiated procedure without prior publication of a contract notice) provides that a contracting authority may use the negotiated procedure without the prior publication of a contract notice in the case of a public contract when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operator. However, in *Commission v Italy (flood safety measures)* [2004] the Commission made it clear that the use of this exception was to be limited to cases of strict necessity backed up by convincing and irrefutable evidence.

This means that ownership of a site by a developer may not be enough to qualify for such an exclusion because the provision of facilities that perform a civic function in return for an opportunity to develop adjacent properties may not be an agreement of strict necessity.

Procedures for the award of public contracts

There are four procedures that the contracting authority can choose to follow:

- open;
- restricted;
- negotiated; and
- competitive dialogue.

Open procedure

The open procedure requires a contract notice to be set out in the Official Journal of the European Commission, and all tenders received must then be considered fairly in accordance with identified criteria.

Restricted procedure

The restricted procedure is where only economical operators selected by the contracting authority may submit tenders with a contract. Potential tenderers are invited by

means of a contract notice in the Official Journal asking economic operators to express an interest. Tender documents are then sent out to selected tenderers. They must be sent out to a sufficiently wide number to ensure genuine competition.

Negotiated procedure

The negotiated procedure is where the contracting authority negotiates with one or more economic operators selected by it. This process can be used only in limited circumstances, which include:

- where open, restricted or competitive dialogue procedures have had to be discontinued;
- exceptionally, where the nature of the work or works to be carried out, the goods to be purchased or hired, or the services to be provided are such as not to permit prior overall pricing; and
- in the case of public services contracts where the specifications cannot be established with sufficient precision to permit the award of the contract using the open or restricted procedure.

Historically the negotiated procedure was the mechanism used in the UK on PFI/PPP projects to allow negotiations to take place under the public procurement regime once a 'preferred bidder' had been selected. It meant that following an initial notice the parties were free to negotiate a deal which could end up very different from that set out in the original notice.

However, the perception that this process undermined the basic principles of transparency and the ability of economic operators to be assessed equally was one of the factors which led to the competitive dialogue procedure being introduced in the 2006 Regulations.

Competitive dialogue

According to regulation 18, this process is to be used where a contracting authority:

> ... is not objectively able to... define the technical means capable of satisfying its needs or objectives; or specify either the legal or financial make-up of a project, or both.

The contracting authority must advertise the contract by publishing a notice in the Official Journal, inviting requests to participate in a dialogue. Applicants can be given criteria on which their request to participate in a dialogue will be evaluated if the contracting authority wishes to select only a limited number of participants.

In practice, once participants are identified the contracting authority should then conduct parallel negotiations (without disclosing confidential information on how those negotiations are developing), usually though a series of stages, to get to a finalised solution.

Anyone who has had any involvement in tendering for PFI and PPP schemes will know that the costs of tendering in such a process can be prohibitively expensive. It is not anticipated that the move from

When can a claim for breach of the Regulations be brought?

Regulation 47(1) of the Public Contract Regulations 2006 makes plain that the contracting authority owes a duty to all economic operators to follow the procedures set out in the Regulations, and that a failure to do so is actionable.

Regulation 47(7), however, puts in place a three-month cut-off date by providing that proceedings need to be brought:

> '... promptly and in any event within three months from the date when grounds for bringing the proceedings first arose.'

Until very recently case law on when grounds for bringing proceedings arose allowed some hope that the time period begins when the breach by the contracting authority occurs and a potential risk of loss arises. Therefore in cases where the council had been negotiating with a preferred developer for several years without following the Regulations, the time for a challenge might have passed even though a development agreement might not have been concluded.

However, in *Amaryllis Ltd v HM Treasury* [2009] the question of when the grounds for bringing proceedings arose (and the case law on the point) was reviewed, and HHJ Coulson concluded that the time started when the specific breach of the Regulations (of which any complaint is made) actually occurs. This will:

> '... often be when the actual decision is made to exclude the claimant tender from the process or wrongly reject his tender.'

Amaryllis therefore supports an argument that a contract awarded by a contracting authority can be challenged during the three months after other tenderers were specifically excluded from the process, even if knowledge of the parties' intention to enter into that contract has been in the public domain for some time before then.

This judgment is advantageous to claimants as the time scale for complaints now embodied in clause 47 of the Regulations is otherwise generally strict (although the court has discretion to consider applications outside the three-month period, where there is good reason for doing so).

The Commission is thought to be keen to see that the Regulations are complied with in all member states. Should it become aware of breaches the likelihood of the Commission challenging the award of a contract is considered reasonably high, not least because enforcing the Regulations is in part what it exists to do. The cost and reputational considerations that will effect the decision-making process of economic operators do not apply to the Commission. Neither do the time limits.

While the perceived wisdom is that the Commission is unlikely to seek to set aside contracts once they have been entered into, the breach does not cease when the contract is entered into.

The Commission may take up the matter with the relevant member state.

the negotiated process to the competitive dialogue process will alter this. Indeed the absence of 'preferred bidder' status could increase costs, particularly for the contracting authority.

Interested parties wishing to understand in greater detail how to run and/or be involved in a competitive dialogue are directed to the Office of Government Commerce's Procurement Policy Note ('Competitive Dialogue 2008') and the Commission's 'Explanatory Note – Competitive Dialogue – Classic Directive'.

be awarded to the lowest tenderer.

What happens on completion of the process?

In all procedures, once the tendering procedure is complete the contracting authority must inform any tenderer who submitted an offer of its decision as soon as possible after it has been made (regulation 32(1)). After that there is a mandatory standstill period of at least ten days before award of the contract, to allow any challenge that an unsuccessful tender may seek to make.

Regulation 6 lists the contracts excluded from the process set out in the Regulations. These include contracts for the acquisition of land, contracts for financial services and services concession contracts.

Setting the criteria for selection

The criteria for awarding a contract under the Regulations are not definitive or exhaustive.

Where the open, restricted or negotiated procedure is used then case law suggests that the basic criteria must be either the lowest cost or the 'most economically advantageous', a term open to some interpretation, and somewhat meaningless without further explanation of how tenders will be assessed. The competitive dialogue requires the latter test to be used (the former should not be capable of being ascertained).

Regulation 30(2) sets out some of the criteria, such as quality, technical merit, functional and aesthetic characteristics, and delivery period. Others can be included, but they must not be arbitrary or have a direct discriminatory effect on tenderers from other member states, and the principles of objectivity, transparency and equal treatment must be upheld. The criteria must also be clearly identifiable as such. Tenderers need to know on what basis their tenders are to be assessed, and they should be assessed on that basis. Weighting needs to be disclosed (regulation 30(3)).

If criteria are not set out in tender documents then the contract has to

Notice of the contract award must also be published in the Official Journal.

Remedies for breach of the Regulations

The basic principles of equal treatment of tenders and transparency are of central importance. Where an unsuccessful tenderer can demonstrate a breach of either the process for tendering set out in the Regulations, or the assessment criteria set out in the contract notice and tender documentation, then a remedy may exist.

In short, contracting authorities need to set out clearly what they want and how they are going to evaluate any offers. Offers then need to be demonstrably evaluated in accordance with those evaluation criteria, the processes set out in the Regulations, and the general principles of transparency and fairness.

If they are not, two options are open:

- Complaint to the Commission (see above).
- High Court action requiring an order for compliance with the Regulations. The court can order interim relief (suspension of the procedure) or final relief (setting aside the concluded contract or making an order for damages arising from the breach).

However, once the contract has been awarded, regulation 47(9) provides that the only remedy available is damages.

Regulation 47(8) expressly grants the right to claim damages to any economic operator who has suffered loss or damage as a consequence of breach. Assessing such damages and indeed proving loss may be complicated (and goes beyond the remit of this article), but damages could run into millions even when simply related to loss of a chance.

Conclusions

As a result of *Roanne* contracting authorities may now follow the Regulations in connection with development agreements where previously they might not have done so. Developers need to be aware of this when investing time and money in developing schemes that require the involvement of contracting authorities. On the positive side, development opportunities throughout Europe will become easier to identify if always advertised in the Official Journal.

It is understood that guidance from the Office of Government Commerce is due to be issued in June 2009 on the situations in which the Regulations apply to development projects where local authorities are involved with private developers, but this has not yet been issued at the time of going to press. It remains to be seen to what extent this provides greater clarity.

Amaryllis suggests that courts will interpret the Regulations with regards to breach in a manner that allows claims for ongoing breach even where initial breaches occurred more than three months before proceedings were commenced.

Parties tendering for works should pay close attention to the criteria for awards set out by contracting authorities. ■

Amaryllis Ltd v HM Treasury
[2009] EWHC 962 (TCC)

Commission v Italy (flood safety measures)
[2004] ECR-8121

Jean Auroux v Commune de Roanne
[2007] ECR I-0385